

This chapter will discuss the elements required to transfer title to property by adverse possession such as; actual possession, open and notorious possession, exclusive possession, continuity of possession, peaceable possession and claim of right. "Tacking" on of adverse rights and the "mother hubbard clause" will be discussed. Applicable Arizona statutes are also included in this chapter.

In General

Adverse possession is an unwritten method by which title to real property can be acquired. Adverse possession is not favored by the courts, therefore statute and common-law requirements must strictly be complied with. The case of *Lewis v. Farrah*, 65 Ariz. 320, 180 P.2d. 578, states as follows:

"There are no equities in favor of one claiming title by adverse possession; he must prove all the necessary elements to establish adverse possession."

Since adverse possession requires strict compliance with statutes, as well as the common-law elements, the Arizona Revised Statutes are shown next:

§ 12-521. Definitions

A. In this article, unless the context otherwise requires:

1. "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.
2. "Peaceable possession" means possession which is continuous, and not interrupted by an adverse action to recover the estate.
3. "Real property" includes mines and mining claims.

B. "Peaceable and adverse possession" need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

§ 12-522. Real property claimed only by right of possession; two year limitation

When a party in possession claims real property by right of possession only, actions to recover possession from him shall be commenced within two years after the cause of action accrues and not afterward. In such actions defendant is not required to show title or color of title from and under the sovereignty of the soil as against the plaintiff who shows no better right.

§ 12-523. Real property in adverse possession under title or color of title; three year limitation

A. An action to recover real property from a person in peaceable and adverse possession under title or color of title shall be commenced within three years after the cause of action accrues, and not afterward.

B. "Title" means a regular chain of transfer from or under sovereignty of the soil. "Color of title" means a consecutive chain of such transfer down to the person in possession without being regular, as if one or more of the memorials or muniments is not recorded or not duly recorded or is only in writing, or such like defect as does not extend to or include the want of intrinsic fairness and honesty, or when the party in possession holds the real property by a land warrant or land scrip, with a chain of transfer down to him in possession.

§ 12-524. City lot claimed under recorded deed; five year limitation

An action to recover a lot located in a city or town from a person having a recorded deed therefor, who claims ownership and has paid the taxes thereon, shall be brought within five years after the cause of action accrues, and not afterward, provided that the person against whom the action is brought, by himself or his grantors, has claimed ownership thereof and has paid the taxes thereon for at least five consecutive years next preceding the commencement of such action.

§ 12-525. Real property in adverse possession and use under duly recorded deed with possessor paying taxes; five year limitation; exception

A. An action to recover real property from a person in peaceable and adverse possession, and cultivating, using or enjoying the property, and paying taxes thereon, and claiming under a deed or deeds duly recorded, shall be commenced within five years after the cause of action accrues, and not afterward.

B. This section shall not apply to anyone in possession of land, who in the absence of this section would claim title through a forged deed, and no one claiming under a forged deed or a deed executed under a forged power of attorney shall be allowed the benefits of this section.

§ 12-526. Real property in adverse possession and use by possessor; ten year limitation; limit of area; fixing of boundaries under duly recorded memorandum of title

A. A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward.

B. The peaceable and adverse possession referred to in subsection A shall not embrace more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed if less than one hundred and sixty acres is so enclosed, but when such adverse possession is taken and held under some written memorandum of title other than a deed which fixes the boundaries of the possessor's claim and is duly recorded, such possession shall be construed to be coextensive with the boundaries specified in such instrument.

§ 12-527. Effect of limitation on title

When an action for recovery of real property is barred by any provision of this article, the person who pleads and is entitled to the bar shall be held to have full title precluding all claims.

§ 12-528. Persons under disability

If a person entitled to commence an action for recovery of real property, or to make any defense founded on the title to real property, is at the time the adverse possession commences or the title first descends, under eighteen years of age, or of unsound mind or imprisoned, the period of such disability shall not be deemed a portion of the time limited for bringing such action or making such defense. Such person shall have the same time, after the removal of the disability, which is allowed to others.

Whether or not a particular situation falls under any particular statute is a matter for an attorney, but it is important for the surveyor to recognize the possible situations where adverse possession may be happening so that the client may be referred to an attorney. In A.R.S. 12-521, "adverse possession" refers to an actual and visual appropriation of the land. This is consistent with the common terminology "open and notorious". The claim must be "hostile" (adverse to the true owner). The possession must be actual. Peaceable possession refers to the continuity of the possession for the statutory time period, that is, it is not physically interrupted or a legal action to the property is not brought against the possessor. Exclusiveness of possession by only one party is also a requirement. All of these elements have been set forth by the Arizona courts, as follows:

"In order to acquire title by adverse possession in this state, such possession must be actual, open and notorious, hostile, under a claim of right for the statutory period." *Wise v. Knapp*, 3 Ariz.App. 99, 412 P.2d. 96.

"Our statutes follow the generally held rule that in order for one to acquire title purely by adverse possession, such possession must be actual, open and notorious, hostile, under a claim of right, continuous for the statutory period (here 10 years), and exclusive." *Rorebeck v. Criste*, 1 Ariz.App. 1, 398 P.2d. 678.

In summary, the main elements required to establish title to land by adverse possession (in addition to statute compliance), are as follows:

1. Open and notorious possession
2. Exclusive possession
3. Actual possession
4. Hostile possession
5. Under a claim of right
6. Continuous for the statutory time period (peaceable)

Elements DiscussedOpen and Notorious Possession

Open and notorious possession with respect to adverse possession means that the possession is of such a nature that the conduct of the possessor is sufficient to put a reasonable and prudent person on notice that the land being possessed is being claimed by the one in possession. It usually is of the nature that anyone in the community would be on notice of the claim upon reasonable inspection of the premises. The question really becomes, what instances constitute this type of notice?

In the case of *Knapp v. Wise*, 122 Ariz. 327, 594 P.2d. 1023, the disputed land was fenced and used as a residence by the claimant. In this case the court stated:

"Where enclosure is relied upon as the evidence of possession, it must be complete and so open and notorious as to charge the owner with knowledge thereof...The question in such cases is whether the enclosure, like other acts of possession, is sufficient to "fly the flag" over the land and put the true owner on notice that his land is held under an adverse claim of ownership...Did the Knapps "fly the flag"? We believe they did...The premises were fenced and being used as the Knapp residence. This was enough to alert the Wises that the Knapps were claiming Parcel No. 1."

This situation of residence and enclosure with obvious occupation is fairly common. This next case of *Conwell v. Allen*, 21 Ariz.App. 383, 519 P.2d. 872 involved the claimant planting and maintaining grass on the disputed land. Here the court stated:

"...we do not believe that under the circumstances such conduct was sufficient to charge appellee with notice."

The court in this case of *Conwell v. Allen* did go on and state some instances where landscaping activities might constitute notice, as follows:

"...there must be physical facts which openly evince and give notice of an intent to hold the land in hostile dominion "or"...in which the claimants planted a tree line as a boundary, planted and maintained a lawn up to the line, and performed other acts of occupancy "or"...in which flowers, grass and trees were planted and a cottage was built partially over the boundary line "or"...in which the plaintiffs mowed the lawn up to the original fence line, constructed a brick patio, and maintained a flower bed and compost heap on the disputed strip."

The case of Overson v. Cowley, 136 Ariz. 60, 664 P.2d. 210 involved grazing cattle on the disputed land. The facts of the case showed that the disputed land was fenced to keep cattle out. The fence was down and in disrepair in certain areas. The court discussed this and set forth two principles as follows:

"Unenclosed land, in this state, has ever been treated as commons for grazing purposes; and hence the mere holding of livestock upon it has not been deemed with such exclusive occupancy as to constitute adverse possession. There must be an "actual occupation of such nature and notoriety as the owner may be presumed to know that there is a possession of the land" * * * "otherwise, a man may be disseised without his knowledge, and the statute of limitations run against him, while he has no ground to believe that his seizure has been interrupted...We find the reasoning of the Texas court persuasive. In our own state, as in Texas, it is not uncommon for cattle to range at will across the open ranch lands. An owner of a mining claim over which cattle grazed would certainly not be expected to surmise that the rancher who owned these cattle was asserting any claim of right to his land. Such use must be viewed as permissive and for that reason does not fall within A.R.S. 12-521 and 12-526 which confer title by adverse possession. We hold therefore that the mere grazing of cattle, absent any other acts of dominion over the land, will not support a claim to land based on adverse possession...In order to satisfy the rule under discussion an enclosure need not always, under all circumstances, be in such condition that it will turn cattle. If a fence, because of the elements, vandalism or other cause be down, the rule is satisfied if it be restored within a reasonable time. What is reasonable depends on all facts and circumstances, bearing in mind that the ultimate fact issue is whether the possession was under claim of right and exclusive and the owner was aware or should have been aware of it." (underlines added for emphasis).

Exclusive Possession

Possession of the disputed land must be exclusive to the party claiming the land by adverse possession. ** This is not a requirement for an easement by prescription, see the chapter on Easements. The following cases address this element of exclusive possession:

"Before possession will ripen into a title it must be peaceable, adverse, open and exclusive". Morgan v. Barrett, 17 Ariz. 376, 153 P.2d. 449.

"In order that title may be acquired by adverse possession the possession of the claimant must be exclusive." Bale v. Coffin, 13 Ariz.App. 550, 479 P.2d. 427.

"The claimant's possession must not only be such as to exclude the owner, but must be such that possession is not shared with any other person." Overson v. Cowley, supra.

Actual Possession

The first inclination to the meaning of actual possession would be to say it requires the actual physical occupation of the disputed land. This is not absolutely true. The following cases discuss the legal meaning of actual possession.

The case of Rorebeck v. Criste, supra, involved a situation where the disputed area was used in a manner where the claimant "repaired a fence on occasion, and cut some weeds on the strip as well as killing ants." The court stated:

"...all the plaintiff must show is that he occupied or used the land as would an ordinary owner of the same type of land taking into account the uses for which the land was suitable."

The case of Spillsbury v. School District No. 19 of Maricopa County, 37 Ariz. 43, 288 Pac. 1027 offered a somewhat liberal interpretation as follows:

"It is suggested that to establish title by adverse possession there must be actual occupancy of the land, and such use of it as it is ordinarily adapted to. This court has held that neither actual occupancy nor cultivation nor residence is necessary to constitute actual possession, and that what acts may or may not constitute a possession are necessarily varied, and depend upon the circumstances of the case. Costello v. Muheim, 9 Ariz. 422, 84 Pac. 906. The property in question consisted of an acre of

ground whereon a brick building stood, surrounded by large trees and a playground. We think the use of the premises for storage under the circumstances was ample to show possession, and that it was not necessary or even practicable that it be farmed."

The case of Kay v. Biggs, 13 Ariz.App. 172, 475 P.2d. 1, also stated:

"Neither A.R.S. 12-521, subsec. A(1) nor 12-521, subsec. A(2) sets any specific time requirement for physical bodily presence which must be complied with...Continuous bodily presence is not required." (This case involves a 'summer home' and is included in this chapter for review).

Hostile Possession

The legal meaning of hostile is best illustrated by excerpts from the following court cases, as follows:

"The term 'hostile' leads to some confusion, however. One dictionary definition might lead to a conclusion that a showing of 'ill will', 'malevolence' or that the plaintiff had an evil intent or desire to thwart or injure is necessary. However, this approach does not correctly show the kind or degree of 'hostility' necessary as an element of adverse possession. There need be no 'ill will' or 'evil intent'. There need be merely a showing that one in possession of the land claims the exclusive right thereto and denies (by words or act) the owner's title. Rorebeck v. Criste, *supra*. (underlines added for emphasis).

" 'Adverse' or 'hostile' as applied to possession of realty does not connote ill will or evil intent, but merely a showing that the one in possession of the land claims exclusive rights thereto and denies by word or act the owner's title." Leon v. Byus, 115 Ariz. 451, 565 P.2d. 1312. (underlines added for emphasis).

"The acts necessary for adverse possession vary and depend upon the circumstances of each case. The fact that the possessor of the land does not realize that he is holding the property adversely or hostile to the interests of another person does not affect the application of the rule. The Arizona Supreme Court has stated:

"In all cases the intention and not the mistake is the test by which the character of the possession is determined, it being prima facie sufficient that actual, visible, and exclusive possession is taken under a claim of right without reference to the fact that a possession was based on mistake." "Walter v. Northern Arizona Title Co., 6 Ariz.App. 507, 433 P.2d. 998.

Notice that the case of Walter v. Northern A.T.C. acknowledged that the adverse possession was a mistake. In other words, the claimant was unaware they were adversely possessing. The requirement simply is to believe what you are claiming is yours, or to simply deny another's title.

Claim of Right

Claim of right is best illustrated as follows:

"The claim of right required here is nothing more than the intention of the one wrongfully going into possession to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right." Gunther & Shirley Co. v. Presbytery of Los Angeles, 85 Ariz. 56, 331 P.2d. 257.

Continuous Possession (Peaceable Possession)

Peaceable possession must continue for the statutory time period required for the case at hand. Peaceable possession means that the possession cannot be physically interrupted or that a legal action is not initiated to recover the premises.

The following cases discuss continuous and peaceable possession:

"Possession is peaceful within the meaning of 12-521, subsec. A, paragraph 2, supra, unless it is physically interrupted..."To constitute an interruption of an occupant's adverse possession, an entry by the owner must be made with the intention of taking possession. Such an entry by the owner, in order to defeat another's adverse possession, must clearly indicate to the occupant that his possession is invalid and his right challenged. It must be open and notorious and bear on its face an unequivocal intention to take possession. It cannot be accidental, casual, secret, or permissive. [Citations]." "

"The question of law for us, then, is whether or not peaceable possession can be interrupted by a mere verbal protest which does not proceed any further. The decisions are in sharp conflict upon this point. In several states it is held that where the owner of land by a verbal act or protest on the premises in which the easement is claimed resists its exercise and denies its existence, his acquiescence therein is thereby disproved, and peaceable possession does not exist...On the other hand, there are many states which take a contrary view...We think it clear

under our statute, unless a possession is physically interrupted so that it cannot be held to be continuous, or else an adverse action is brought to recover the estate, it is peaceable possession..." Conness v. Pacific Coast Joint Stock Land Bank of San Francisco, 46 Ariz. 338, 50 P.2d. 888.

Interpretation of peaceable by the Arizona courts certainly make it easier to gain title by adverse possession.

Tacking/ Mother Hubbard Clause

"Tacking" is a method whereby a current possessor of land adds his time of possession to the time of possession of his predecessors in order to meet the required time period for the applicable statute of limitations. This seems to defeat the required elements of continuous and exclusive possession, but it is allowable in Arizona providing there is "privity of estate". The following case illustrates this as follows:

" "Tacking" is a doctrine which permits one claiming title by adverse possession to add his period of possession to that of a prior adverse possessor or possessors in order to establish a continuous possession for the statutory period." Cheatham v. Vanderwey, 18 Ariz.App. 35, 499 P.2d. 986.

The key to being able to tack successive possessions is "privity of estate". This is discussed as follows:

"...defendants say the law requires that where, as here, it appears that there were several successive adverse occupants of the premises, their possession can be tacked together only when evidenced by deeds duly executed. The rule, however, seems to be that "any conveyance, agreement, or understanding which will refer the several adverse possessions to the original entry and which is accompanied by a transfer of possession will create such a privity as to permit a tacking. The ordinary solemnities for the transfer of land are not required; no written instrument is necessary, a parol transfer will suffice..." Santos v. Simon, 60 Ariz. 426, 138 P.2d. 896. (underlines added for emphasis).

When tacking is accomplished in a written instrument, it is referred to as the "mother hubbard clause". An example of a mother hubbard clause may read, "including any and all rights of possession which may exist beyond the boundaries described herein".

Some Questions Answered

Three questions often asked are: 1) Can a private party adversely possess against the government? ; 2) Can a school district (in Arizona) adversely possess against a private party? and; 3) Can the government adversely possess against a private party? These questions have been answered by our courts.

With regards to the first question, Can a private party adversely possess against the government? The following cases state:

"...title to a properly dedicated street can not be obtained through adverse use..." Edwards v. Sheets, 66 Ariz. 213, 185 P.2d. 1001.

"Of course title to a properly dedicated street or any part thereof cannot be obtained through adverse possession or use." Drane v. Avery, 72 Ariz. 100, 231 P.2d. 444.

"It is the general rule that statutes of limitations do not operate against the State and title to the State-owned lands cannot be acquired by adverse possession or prescription while the State retains its title." Pretzer v. Lassen, 13 Ariz.App. 555, 479 P.2d. 430.

" * * * the general rule is that laches, acquiescence, or unreasonable delay in performance of duty on the part of officers of the state is not imputable to the state when acting in its character as a sovereign." Cracchiolo v. State of Arizona, 6 Ariz.App. 597, 435 P.2d. 729.

And finally from the case of Cracchiolo v. State:

"Generally, in the absence of legislation to the contrary no easement can be acquired in property of the state, particularly such property as is held for public use; at least there can be no such right of user by an individual as will interfere with public rights in the property."

The second question, Can a school district adversely possess against a private party? The court in addressing this issue stated as follows:

"It was also suggested that a school district cannot establish title by adverse possession. We think this conclusion is contrary to the general weight of authority." Spillsbury v. School District No. 19 of Maricopa County, supra.

And lastly, the question, Can the government adversely possess against a private party? The following cases state as follows:

"Title by adverse possession may be acquired by the United States, or by a state, county, city, or other governmental entity." 3 Am.Jur.2d., Adverse Possession, section 180, page 267.

"One of the methods of acquiring title to land is by adverse possession...We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method." City of Raleigh v. Durfey, 79 S.E. 434.

Many states have applied the foregoing reasoning, however, Arizona's constitution requires that "just compensation" is made when acquiring title to land from private parties. It is certain that title to land by adverse possession cannot create user highways in Arizona (except as discussed in the chapter on Highway Law).

The Role of the Surveyor

With Arizona's interpretation of peaceable favoring the possessor, and with the claimant being able to adversely possess under a mistaken belief of the true boundary line, one can see how easy it is to gain title by adverse possession. For this reason the surveyor must be extra careful.

The surveyor gathers information that will play key roles in determining whether adverse possession has occurred. Location of an old fence can substantiate its long standing, or location of a new fence can be evidence of when possession to that line began, and may be used in a legal action years later. When the surveyor suspects that adverse possession has occurred, either to the benefit or detriment of the client, the client must be notified. The surveyor should recommend advise from an attorney if the issue is to be pursued. The surveyor should monument the "original" corners and lines clearly showing the lines of possession and indicating any facts which are important when considering whether adverse possession has occurred. It is advised that an acreage be stated for the area in question. This may reduce liability should a land transaction occur based upon the surveyor's area.

Reprinted with permission from 398 P.2d. 809,
Copyright ©1965 by West's Publishing Company.

1 Ariz.App. 1
Iva L. ROREBECK, Sebe L. Broyles and
Clarice L. Broyles, his wife, Appellants,
v.
Helen CRISTE, the wife of John Criste,
Appellee.*
No. 1 CA-CIV 3.

Court of Appeals of Arizona.
Feb. 2, 1965.

Plaintiff brought suit for title to strip of property by adverse possession. The Superior Court, Maricopa County, No. 106898, Jack D. H. Hays, J., found for plaintiff and defendants appealed. The Court of Appeals, Cameron, J., held that where plaintiff and her predecessor occupied and claimed property as their own even though they had no knowledge that they were encroaching upon property of defendant, they could acquire title to property by adverse possession, and that where defendants lived in the house south of fence line between defendants' and plaintiff's property, and for approximately 14 years defendants left fence standing as an outward indication to the world that the dividing line between the two properties was indeed the fence line, finding that plaintiff's acquired title to strip of property on north side of fence line by adverse possession was justified.

Affirmed.

1. Appeal and Error ¶989

Question before court on appeal, in case tried without jury, was whether evidence taken in light most favorable to plaintiff would support judgment for title to property by reason of adverse possession.

2. Adverse Possession ¶13

Generally, in order for one to acquire title purely by adverse possession, such possession must be actual, open and notorious, hostile, under a claim of right, con-

to this Court pursuant to Section 12-120.-
23 A.R.S.

tinuous for statutory period, and exclusive. A.R.S. §§ 12-521, subsecs. A, par. 1, B, 12-526.

3. Adverse Possession §27

Evidence that plaintiff and her predecessor used property for grazing cattle right up to fence line, irrigated up to fence line, leased property to others for the raising of sudan grass and planted cacti along fence line was sufficient to show actual occupancy of strip of land in question.

4. Adverse Possession §58

To be adverse, possession must be hostile, not only against the true owner, but against the world.

5. Adverse Possession §60(1)

"Hostile" as applied to possession of occupant of realty holding adversely does not connote ill will or evil intent, but merely a showing that one in possession of the land claims exclusive right thereto and denies by word or act the owner's title.

See publication Words and Phrases for other judicial constructions and definitions.

6. Adverse Possession §66(1)

Existence of fence between plaintiff's and defendants' property and its repair by plaintiff was one visible indication of a possession hostile to defendants and to the world.

7. Adverse Possession §65

A person may acquire title by adverse possession under a mistake of fact.

8. Adverse Possession §65

Where plaintiff and her predecessor occupied land in question, even though they had no knowledge that they were encroaching upon property of defendant, they still occupied and claimed property as their own and thus could acquire title to property by adverse possession.

9. Adverse Possession §43(4)

Where property in question was purchased by plaintiff's predecessor who deeded it to plaintiff, his wife, as her sole and separate property, statute providing that peaceable and adverse possession need not be

continued in the person, but may be held by successive individuals as long as there is privity of estate, was satisfied. A.R.S. § 12-521, subsec. B.

10. Adverse Possession §47

Defendants' cutting of weeds on strip in question as well as killing ants would benefit defendants almost as much as plaintiff, and was not an indication that the person doing so was disputing the adverse possession of plaintiff.

11. Adverse Possession §16(1)

All plaintiff must show to establish adverse possession is that he occupied or used land as would an ordinary owner of the same type of land taking into account the uses for which the land was suitable.

12. Adverse Possession §66(1)

Where defendants lived in the house south of fence line between defendants' and plaintiff's property, and for approximately 14 years defendants left fence standing as an outward indication to the world that the dividing line between the two properties was indeed the fence line, finding that plaintiff's acquired title to strip of property on north side of fence line by adverse possession was justified. A.R.S. §§ 12-521, subsecs. A, par. 1, B, 12-526.

Tenney & Pearson, Phoenix, for appellants.

Elsing & Crable, John J. Barkley, Paul H. Primock, Phoenix, for appellee.

CAMERON, Judge.

This is an appeal by the defendants below from a judgment of the Superior Court of Maricopa County in favor of the plaintiff-appellee, Helen Criste, granting title to the plaintiff in a strip of land some 23 feet wide and approximately a quarter of a mile long.

27th Avenue in Maricopa County, Arizona, runs north and south. On the east side of said avenue, are two adjoining pieces of property. The south portion is owned by the defendants and the north portion is

owned by the plaintiff, Helen Criste. Both parcels were formerly owned by the same person. In September, 1944, the south portion was deeded to the defendant and in October, 1945, the north portion was sold to the plaintiff's predecessor in interest by an agreement for sale. A deed dated 8 October, 1945, was recorded 15 February, 1946. Plaintiff's predecessor in interest, Mr. John Criste, is also plaintiff's husband.

Prior to both sales there was a fence running the complete length of the property from west to east. Said fence was actually 23 feet to the south of the true boundary line between the two parcels. When defendants entered upon the property they were aware, by their own testimony, that the fence did not represent the dividing line between their property and the property to the north. They had a survey made in 1948, at or near the time that plaintiff had a survey made on the property. At this time, the defendants knew that the fence was approximately 23 feet south of the true line, and the plaintiff's predecessor in interest learned for the first time that the fence was not on the true line, and that the property they occupied overlapped some 23 feet on defendants' property.

The testimony below is ample to show that the plaintiff and her predecessor occupied the north property up to the fence line until 1959, when the defendants tore the fence down.

Mr. Criste, plaintiff's husband, occupied the property in 1945. Mr. Criste's testimony indicates that he thought his property ran from fence line to fence line. At the time of his occupancy of the property, Mr. Criste had no knowledge that the fence line was not in fact the true line separating the two properties. The evidence shows that he farmed the land, grazed cattle on the property, and irrigated the property up to the fence line; leased the land for the raising of sudan grass, up to the fence line; and, on occasion, made repairs on the fence. The driveway to the house on the plaintiff's property ran over the 23 foot strip, and the

irrigation ditch of the defendants ran along the south of the fence. Mr. Criste deeded the property to the plaintiff as her sole and separate property in 1949, and the Cristes left shortly after that, but left Mr. Criste's mother on the property. Mother Criste continued to occupy the property, planted cacti along the fence line, and even made repairs on the fence itself. The driveway was closed by a fence along 27th Avenue, but was used several times a month when she had visitors, and used for parking during the monthly meetings of the American-Rumanian Club.

The defendants claim that when the survey was made in 1948, they placed a large post on the true property line at the extreme east end of the property. This is disputed by the testimony on behalf of the plaintiff, and the court could well find that the post was not placed on the property until much later, perhaps even after the bringing of the lawsuit. In any event, sometime in 1959, January or Good Friday, depending on which way the evidence is viewed, the fence was torn down by the defendants, and plaintiff brought suit for title to the property by adverse possession.

[1,2] The matter being tried before the court below without a jury, the Question before this court is whether the evidence taken in the light most favorable to the plaintiff will support a judgment for title to the property by reason of adverse possession. *Hillman v. Busselle*, 66 Ariz. 139, 185 P.2d 311 (1947).

The Arizona Revised Statutes states in Sec. 12-521 A (1) as follows:

"'Adverse possession' means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

Section B of 12-521 ARS is as follows:

"'Peaceable and adverse possession' need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them."

Under the facts in this case, it takes ten years for adverse possession of a piece of real property to ripen into title, Sec. 12-526 ARS.

Our statutes follow the generally held rule that in order for one to acquire title purely by adverse possession, such possession must be actual, open and notorious, hostile, under a claim of right, continuous for the statutory period (here 10 years), and exclusive. It is generally conceded that all of these elements must coincide before one may acquire title by adverse possession.

[3] In the instant case, the plaintiff and her predecessor had actual possession of this property. They used the property for grazing cattle right up to the fence line; they irrigated up to the fence line; they leased the property to others for the raising of sudan grass, again up to the fence line; and their driveway ran over the disputed property. Mother Criste planted cacti along the fence line. We think that there is ample testimony to show actual occupancy of the strip of land in question.

Also, the testimony shows that such occupancy was open and notorious. The fence was an apparent separation of the property for all the world to see. The grazing of the cattle, irrigation and leasing of the property was notice to the world and particularly to the defendants that the plaintiff and her predecessors were treating this property as their property, and not as defendants' property.

[4] It is almost unanimously agreed that to be adverse the possession must be hostile, not only against the true owner, but as against the world. *Gunther & Shirley Company v. Presbytery of Los Angeles*, 85 Ariz. 56, 331 P.2d 257 (1958).

[5,6] The term "hostile" leads to some confusion, however. One dictionary definition might lead to a conclusion that a showing of "ill will", "malevolence" or that the plaintiff had an evil intent or desire to thwart or injure is necessary. However, this approach does not correctly show the kind or degree of "hostility" necessary

as an element of adverse possession. There need be no "ill will" or "evil intent". There need be merely a showing that one in possession of the land claims the exclusive right thereto and denies (by word or act) the owner's title. *Gusheroski v. Lewis*, 64 Ariz. 192, 167 P.2d 390 (1946); *Mittet v. Hansen*, 178 Wash. 541, 35 P.2d 93 (1934); 1 Am.Jur., Adverse Possession Sec. 138, p. 872. In our opinion, the existence of the fence and its repair by the parties is one visible indication of a possession hostile to the defendants and to the world.

Possession of the property must be under a "claim of right" inconsistent with the rights of the owner. In the present case, the plaintiff's predecessor had no knowledge that the fence line was not, in fact, the true line separating the two properties. Clearly, there was no intent on the part of plaintiff's predecessor to claim the property adversely in 1945. At first indication, it would seem that there was no "claim of right" to the property prior to the survey in 1948, since there was no knowledge on the part of Mr. Criste that he was occupying something that did not belong to him already. The earlier cases so held, *Buchanan v. Nixon*, 163 Tenn. 364, 43 S.W.2d 380 (1931), and it has been stated as follows:

"It is often stated, and as an abstract proposition is certainly the prevailing rule, that where a party, through ignorance, inadvertence or mistake, occupies land beyond his true line, under the belief that it lies within his true boundary * * * his possession of the land lying outside the true line is not adverse, since the intent to claim title exists only upon the condition that the line acted upon is, in fact, the true line, and hence an indispensable element of adverse possession is wanting." 80 A.L.R. 155.

[7,8] While this view may seem well founded in logic, still it is not the law in Arizona. Our Supreme Court has discussed this matter as follows:

"Where a person, acting under a mistake as to the true boundary line be-

tween his land and that of another, takes possession of land of another believing it to be his own, up to a mistaken line, claims title to it and so holds, the holding is adverse and, if continued for the requisite period, will give title by adverse possession. And the fact that on taking possession he had no intention of taking what did not belong to him, or claimed that he had no desire or intention to take land belonging to the adjoining owner, or that he would have surrendered possession if he had known that the land in dispute was not within the calls of his deed, or that the owner of the record title was ignorant of the location of the true boundary line or of the fact that the land was his, or supposed that the adverse occupant intended to claim only what he actually owned, or the fact that both owners were mistaken as to the true boundary line, does not affect the operation of the rule. * * * In all cases the intention and not the mistake is the test by which the character of the possession is determined, it being prima facie sufficient that actual, visible, and exclusive possession is taken under a claim of right without reference to the fact that the possession was based on mistake. 2 C.J. 141, § 245." *Trevillian v. Rais*, 40 Ariz. 42, 45, 9 P.2d 402, 403 (1932).

The rule in Arizona is that a person may acquire title by adverse possession under a mistake of fact. In the instant case, the plaintiff and her predecessor occupied the land in question, and even though they had no knowledge that they were encroaching upon the property of the defendant, still they did occupy and claim the property as their own.

[9] Our statute provides that the "peaceable and adverse possession" need not be continued in the person, but may be held by successive individuals as long as there is privity of estate, Sec. 12-521 B, ARS. Here the property was purchased by Mr. Criste who in turn deeded it to his wife,

the plaintiff, as her sole and separate property. There can be no question but that this satisfies our statute on the subject.

[10,11] The defendants question whether the occupancy was exclusive and point to the fact that defendants repaired the fence on occasion, and cut some weeds on the strip as well as killing ants. It could reasonably be inferred from the evidence, that this was merely an adjunct of the maintenance of the defendants' property. The cutting of weeds and killing of the ants would benefit the defendants almost as much as the plaintiff, and it is not an indication that the person doing so is disputing the adverse possession of the plaintiff. We would point out that the occupancy by the plaintiff, to be exclusive, does not have to take the form of any particular type of occupancy. Of course, the more nearly absolute his exclusiveness is, the stronger his position. But all the plaintiff must show is that he occupied or used the land as would an ordinary owner of the same type of land taking into account the uses for which the land was suitable. *Norgard v. Busher*, 220 Or. 297, 349 P.2d 490, 80 A.L.R.2d 1161 (1960). Land which was used ten years ago as farm land may be primarily residential ten years later. The law does not require that a party having occupied the land as farming land must continue to farm the said land for ten years for adverse possession to ripen into title. All that is necessary is that he occupy and use the land as would a normal owner of the land taking into consideration the changing uses for which the property in the general neighborhood may be put.

[12] We are not called upon to decide whether or not the defendants in this case might be viewed in a different light were this unimproved desert land. Here, however, the defendant lived in the house on the south property. Every day that he occupied the property he could see the fence between the two properties. For approximately 14 years he left the fence standing as an outward indication to the

world that the dividing line between the two properties was, indeed, the fence line.

The trial court having heard the evidence in the case, arrived at the same conclusion. We, therefore, hold that the judgment must be and is affirmed.

STEVENS, C. J., and DONOFRIO, J., concurring.

Reprinted with permission from 475 P.2d. 1,
Copyright ©1971 by West's Publishing Company

13 Ariz.App. 172

Joseph W. KAY and Georgia A. Kay, his wife, and Transamerica Title Insurance Company, an Arizona corporation, Rose B. Nash, a widow, Frank Ziede and Ann Ziede, his wife, Tom Ajamie and Evelyn Ajamie, his wife, Edgar T. Ajamie, a single man, Albert Felix, a single man, and Amil J. Ajamie, a single man, Appellants,

v.

Fred S. BIGGS and Zula Biggs, his wife, Appellees.

No. 1 CA-CIV 1106.

Court of Appeals of Arizona,
Division 1,
Department B.
Oct. 5, 1970.

Claimants brought action to quiet title by adverse possession against adjacent landowners who filed third-party complaint alleging breach of warranty of title. The Superior Court, Navajo County, Cause No. 11530, Ruskin Lines, J., rendered judgment for plaintiffs against defendants and for defendants against third-party defendants, and defendants and third-party defendants appealed. The Court of Appeals, Eubank, P. J., held that where claimants built summer home next to disputed parcel in area where there were other such homes and used it exclusively as such for almost 30 years by spending two or three weeks continuous physical presence there each summer, claimants' possession established "continuous peaceable possession" and an "adverse" claim within adverse possession statute, and evidence was sufficient to support the judgments.

ute, and evidence was sufficient to support the judgments.

Affirmed.

1. Appeal and Error ⇨846(5)

Where trial court, sitting without a jury, made no findings of fact or conclusions of law and where parties requested none, all inferences supported by the evidence would be drawn in favor of successful plaintiffs and the judgments. 16 A.R. S. Rules of Civil Procedure, rule 52.

2. Adverse Possession ⇨16(1), 115(2)

"Possession" as used in statute is not synonymous with physical bodily presence of adverse claimant; continuous bodily presence is not required, but rather question is one of fact which must be determined from circumstances of each case. A.R.S. § 12-521, subsec. A.

See publication Words and Phrases for other judicial constructions and definitions.

3. Adverse Possession ⇨17, 19

Where adverse claimants built summer home next to disputed parcel, fenced in the parcel, and spent two or three weeks on land each summer for almost 30 years, claimants established continuous peaceable possession and adverse claim within adverse possession statute. A.R.S. § 12-526, subsec. A.

4. Adverse Possession ⇨65(1)

It was not material to adverse claim by persons who had used disputed parcel

for almost 30 years that original boundary line was established by mistake.

5. Costs — 173(1)

Award of attorney's fee of \$750 to plaintiffs in quiet title action for billed time of 21.9 hours was reasonable and did not constitute an abuse of court's discretion. A.R.S. §§ 12-1101 et seq., 12-1103.

Denzil G. Tyler, Winslow, for appellants.

Axline & Johnson, Holbrook, and Johnson, Shelley, Roberts & Riggs, by J. La-Mar Shelley, Mesa, for appellees.

EUBANK, Presiding Judge.

This appeal is brought by the defendants Joseph W. and Georgia A. Kay, husband and wife, and the Transamerica Title Insurance Company, together with the third-party defendants, Rose B. Nash, et al., as appellants and hereafter referred to as defendants and third-party defendants, respectively, from a judgment quieting title by adverse possession in the plaintiffs, Fred S. and Zula Biggs, husband and wife, appellees herein and hereafter referred to as plaintiffs, to a disputed parcel of real property located approximately two miles south of Lakeside in Navajo County, Arizona, described as follows:

Beginning at a point 955.0 feet West (Bearing given by G.L.O. Notes) of the Northeast corner of the Northwest Quarter of Section 6, Township 8 North, Range 23 East of the Gila and Salt River Base and Meridian, and on the North line of said Section 6; running thence West 56.4 feet; thence South 0°20'20" East 40 rods (66.0 feet); thence East 51.0 feet; thence North 0°09'50" East 40.0 rods (660.0 feet) to the point of beginning.

The disputed parcel of land adjoins plaintiffs' deeded land on its western boundary line and is approximately rectangular in shape, being approximately 56 feet wide on the north and south sides and 660 feet long on the east and west sides.

The plaintiffs filed their complaint against the defendants to quiet title (A.R.S. § 12-1101, et seq.) alleging that they were the owners in fee simple estate of the disputed parcel of land by virtue of their adverse possession of it for more than ten consecutive years. They further alleged damages for the defendants' wrongful removal of their boundary line fence and, in addition, asked that attorney's fees be awarded them for defendants' refusal to execute a quit-claim deed when tendered as authorized by A.R.S. § 12-1103.

Defendants answered denying the allegations of the complaint, affirmatively claiming ownership of the disputed parcel of land and admitting that they refused to execute the proffered quit-claim deed. In addition to their answer, the defendants filed a third-party complaint against Rose B. Nash, a widow, and the other parties listed after her name in the caption, alleging that the defendants had acquired the disputed parcel from the third-party defendants by warranty deed and that in the event the plaintiffs were successful in the quiet title action the third-party defendants would be liable to them for a breach of warranty of title. Following the denial of reciprocal motions for summary judgment the matter was tried to the court sitting without a jury.

The trial court entered judgment quieting title in the plaintiffs and awarding them attorney's fees and costs. In a separate judgment, the trial court awarded the defendants judgment against the third-party defendants for the loss of the disputed parcel of land and the attorney's fees and costs awarded plaintiffs in the primary judgment. Neither side requested the Court to make Rule 52, Rules of Civil Procedure, 16 A.R.S., findings of fact and conclusions of law, and none were made. Defendants and third-party defendants appeal from both judgments.

[1] Defendants and third-party defendants raise seven questions for our consideration on appeal. The first five deal with sufficiency of the evidence to sustain the judg-

ment questions. Due to the fact that the trial court, sitting without a jury, made no findings of fact or conclusions of law and that the parties requested none, all inferences supported by the evidence must be drawn in favor of the plaintiffs and the two judgments. *Rosen v. Hadden*, 81 Ariz. 194, 303 P.2d 267 (1956); *Gardner v. Royal Development Co.*, 11 Ariz.App. 447, 465 P.2d 386 (1970). The last two questions deal with the propriety of the trial court's determination of attorney's fees and the allegation of an error in law or of an abuse of discretion in setting the fee.

Taking the first five questions relating to the sufficiency of the evidence and construing all inferences in favor of the judgment, we find that in 1937 the real property owned by the plaintiffs and defendants, including the disputed parcel, were combined into a single tract owned by Mr. Hans Hanson. In that year the plaintiffs negotiated with Mr. Hanson for the purchase of a 2-acre parcel of land. In order to establish the west boundary line of the 2-acre parcel, Mr. Hanson pointed out a "witness tree" and measurements were made from it to the boundary line by means of a "surveyor's chain" and transit. The boundary line thus located was in error and included the disputed parcel of land within plaintiffs' 2-acre tract. At that time Mr. Hanson, the plaintiff-husband, the plaintiff-husband's brother and other witnesses present were satisfied that the true boundary line had been located. Thereafter a fence was erected confirming the boundary line as located and inclosing the disputed parcel within the plaintiffs' boundary fence. After some delay the plaintiffs obtained a deed to the 2-acre parcel in 1940, which did not include the disputed parcel of land within the description of land deeded to plaintiffs.

The plaintiffs used the property for a summer home, physically occupying it for only two to three weeks each year. On the disputed parcel of land they erected and maintained the boundary line fence, cultivated the land several times, planted apple trees which they pruned and harvested

over the years, built and moved an out-house several times, piled and stored wood, removed stumps, and in general fully occupied and used the property two to three weeks each year. Immediately adjacent to the disputed parcel, plaintiffs built a cabin in 1946 and resided there when visiting the property. Plaintiffs' possession and control of the disputed parcel continued uninterrupted and unquestioned for almost thirty years until some time after May 27, 1965, when the defendants purchased the real property west of plaintiffs from the third-party defendants and had the property surveyed. The survey showed that the disputed parcel was occupied by the plaintiffs and the defendants requested them to vacate the disputed area. When plaintiffs refused to do so, defendant Joseph Kay physically removed the old established boundary line fence himself in the winter of 1966 without plaintiffs' consent or knowledge. Mr. Kay then constructed a new boundary line fence 50 plus feet east of the old fence in order to include the disputed parcel, including a row of plaintiffs' apple trees, within his own fence lines. There is no dispute that the real estate taxes on the disputed parcel were paid by the defendants and their predecessors in title.

Defendants and third-party defendants contend, in effect, that the foregoing fails to establish adverse possession as a matter of law for the reason that two or three weeks physical occupancy each year does not establish the element of peaceful possession or continuous possession required to perfect title by adverse possession. They cite no case law supporting this position and we disagree with their contention.

[2] "Adverse Possession" is defined by A.R.S. § 12-521, subsec. A (1) as meaning "* * * an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.", while "peaceable possession" is defined at A.R.S. § 12-521, subsec. A (2), as, "* * * possession which is continuous, and not in-

terrupted by an adverse action to recover the estate." These two definitions are applicable to the 10-year statute of limitation, A.R.S. § 12-526, subsec. A which reads as follows:

"A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having *peaceable* and *adverse possession* thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward." (emphasis added)

Neither A.R.S. § 12-521, subsec. A (1) nor § 12-521, subsec. A (2) sets any specific time requirement for physical bodily presence which must be complied with in order for a claimant to claim the continuous possession required to perfect title by adverse possession. "Possession" as used in 12-521, subsec. A is not synonymous with the physical bodily presence of the adverse claimant. Continuous bodily presence is not required. Rather, the question is one of fact which must be determined from the circumstances of each case. *Spillsbury v. School District No. 19*, 37 Ariz. 43, 288 P. 1027 (1930).

In a boundary line fence case, *Rorebeck v. Criste*, 1 Ariz.App. 1, 398 P.2d 678 (1965), this court, discussing peaceable and adverse possession, said:

"We would point out that the occupancy by the plaintiff, to be exclusive, does not have to take the form of any particular type of occupancy. Of course, the more nearly absolute his exclusiveness is, the stronger his position. *But all the plaintiff must show is that he occupied or used the land as would an ordinary owner of the same type of land taking into account the uses for which the land was suitable.* (citation) Land which was used ten years ago as farm land may be primarily residential ten years later. The law does not require that a party having occupied the land as farming land must continue to farm the said land for ten years for adverse possession to

ripen into title. All that is necessary is that he occupy and use the land as would a normal owner of the land taking into consideration the changing uses for which the property in the general neighborhood may be put." 1 Ariz.App. 5, 398 P.2d 682. (emphasis added)

In the similar factual case to the one at bar of *Cowan v. Hatcher*, 59 S.W. 689 (Tenn. Ch.App., 1900), the court held that the adverse possession element of continuous use was proven where the evidence established that the claimant went upon the land to make personal use of a mineral spring, built a cabin, cleared one and one-half acres of land, fenced it, planted fruit trees, constructed a stable and spent two to four weeks each summer at the cabin with his family for the statutory period. See the cases collected in 24 A.L.R.2d 632 (annotation: Adverse Possession, sufficiency as regards continuity of seasonal possession other than Agricultural or logging purposes), and in 3 Am.Jur.2d, Adverse Possession, §§ 56, 57, pp. 145, 146. See also *Kraus v. Mueller*, 12 Wis.2d 430, 107 N.W.2d 467 (1961) where the continuous occupancy of a hunting shack during hunting season was sufficient exclusive possession; *Nechtow v. Brown*, 369 Mich. 460, 120 N.W.2d 251 (1963) where the use of property for a summer home for recreational purposes was sufficient adverse possession; *Mahoney v. Heebner*, 343 Mass. 770, 178 N.E.2d 26 (1961) where even seasonal physical absence from a summer residence did not break the chain of continuous peaceable possession for the purpose of establishing adverse user; and *Booten v. Peterson*, 47 Wash.2d 565, 288 P.2d 1084 (1955) where weekend summer use of a beach place was held sufficient to establish peaceable adverse possession to an adjacent parcel of real property used for a recreation center and camping.

[3] Under the facts of this case, it cannot be said that the plaintiffs failed to treat the disputed parcel of land "as would an ordinary owner of the same type of land." They built a summer home in an

area where there were other such homes and used it exclusively as such for almost thirty years. They physically erected a fence and buildings and dealt with the disputed parcel as if they were the owners. These facts satisfy the early requirements of "actual" and "visible" possession discussed in *Costello v. Muheim*, 9 Ariz. 422, 428, 84 P. 906 (1906). In the *Costello* case the Supreme Court accepted as the law in Arizona the proposition that neither actual occupancy nor cultivation nor residency was necessary to constitute actual possession, and that the acts necessary to constitute peaceful possession were necessarily varied depending upon the circumstances of each case. Holding that the facts were insufficient in *Costello* to apply the rule, the court did apply it, however, in *Spillsbury v. School District No. 19*, supra, by affirming the school district's acquisition of an acre of real property by such adverse possession.

Under the facts and circumstances of this case we hold that the evidence establishing two or three weeks continuous physical presence coupled with the other facts in this case is sufficient to establish the "continuous peaceable possession" and the "adverse" claim element required by the statute. Consequently, the evidence is sufficient to support both judgments.

[4] It is not material under the facts of this case that the original boundary line was established by mistake. See *Trevillian v. Rais*, 40 Ariz. 42, 9 P.2d 402 (1932); *Higginbotham v. Kuehn*, 102 Ariz. 37, 39, 424 P.2d 165 (1967). As stated in *Trevillian*, pp. 45, 46, 40 Ariz. and pp. 402, 403, 9 P.2d:

"Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another believing it to be his own, up to a mistaken line, claims title to it and so holds, the holding is adverse and, if continued for the requisite period, will give title by adverse possession. And the fact that on taking possession he had no intention of

taking what did not belong to him, or claimed that he had no desire or intention to take any land belonging to the adjoining owner, or that he would have surrendered possession if he had known that the land in dispute was not within the calls of his deed, or that the owner of the record title was ignorant of the location of the true boundary line or of the fact that the land was his, or supposed that the adverse occupant intended to claim only what he actually owned, or the fact that both owners were mistaken as to the true boundary line, does not affect the operation of the rule. * * * In all cases the intention and not the mistake is the test by which the character of the possession is determined, it being *prima facie* sufficient that actual, visible, and exclusive possession is taken under a claim of right without reference to the fact that the possession was based on mistake.'"

[5] The last two questions on appeal deal with the trial court's determination and award of attorney's fees. The defendants contend that the award of \$750 attorney's fees to the plaintiffs was an abuse of the trial court's discretion because the plaintiffs presented no evidence on the question of attorney's fees prior to resting and the defendants and third-party defendants were not afforded an opportunity to be heard on the issue. The record reveals the affidavit of plaintiffs' counsel filed after the trial detailing billed time at 21.9 hours. There is no additional affidavit detailing the length of trial or post-trial efforts in preparing and protecting the judgment, although the court could take judicial knowledge of that. No contention is made that the amount awarded was unreasonable. This court has held that under our quiet title law (A.R.S. § 12-1101 et seq.), an attorney's fee award under A.R.S. § 12-1103 is recovered as an element of the costs and as such the trial court may take judicial notice of the services performed by counsel for the plaintiffs in assessing the award. *Hammontree v. Kenworthy*, 1 Ariz.App. 472, 404 P.2d 816

(1965). See *McNeil v. Attaway*, 87 Ariz. 103, 348 P.2d 301 (1959). We have reviewed the record and it is our opinion that the attorney's fee award by the trial court is reasonable and does not constitute an abuse of the court's discretion.

It is not necessary to discuss defendants' reformation argument because we have held that the evidence was sufficient to support both judgments.

Both judgments are affirmed.

HAIRE and JACOBSON, JJ., concur.